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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 113

THE HONORABLE CASPER PLATT, CHIEF JUDGE, UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF ILLINOIS, PETITIONER

v.

MINNESOTA MINING AND MANUFACTURING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinions of the court of appeals (R. 238–254) are reported at 314 F. 2d 369. The memorandum and order of the district court denying respondent's motion to transfer (R. 219–227) have not been reported.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 1963 (R. 255). On March 28, 1963, Mr. Justice Clark extended the time within which to file a petition for a writ of certiorari to and including April 29, 1963 (R. 256). The petition was filed

on the latter date, and was granted on June 17, 1963 (R. 257; 374 U.S. 825). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

A motion under Rule 21(b) of the Federal Rules of Criminal Procedure to transfer a multi-venue Sherman Act case to the district of the corporate defendant's headquarters was denied by the district court on the ground that transfer was not in the "interest of justice." On mandamus, the court of appeals held that it was improper for the district court to consider, as one element in its determination, the difficulty of selecting an impartial jury in the district of the defendant's headquarters. The court of appeals then issued a writ of mandamus ordering transfer to that district. The questions presented are:

1. Whether the court of appeals, having concluded that one of several factors relied upon by the district judge was an improper consideration, should thereupon have remanded the case to the district judge with instructions to exercise his discretion in light of a proper standard, rather than ordering a transfer on the basis of the reviewing court's own *de novo* findings and evaluation of the facts.

2. Whether district judges, in determining whether a transfer would be in the "interest of justice" under Rule 21(b), are required to give heavy or dispositive weight to the fact that the proposed transferee district is the headquarters, or "home district," of a corporate defendant.

STATUTE AND RULE INVOLVED

Section 1651(a) of Title 28 U.S.C. provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Rule 21(b) of the Federal Rules of Criminal Procedure provides:

> *Offense Committed in Two or More Districts or Divisions.* The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged.

STATEMENT

On December 13, 1961, a grand jury sitting in Danville, Illinois, in the United States District Court for the Eastern District of Illinois, returned a nine-count indictment charging the respondent, Minnesota Mining and Manufacturing Company ("3M"), with violating Sections 1 and 2 of the Sherman Act. The indictment (R. 2–23) charged that 3M had attempted to monopolize, engaged in a combination and conspiracy in restraint of, and conspired to monopolize interstate and foreign commerce in pressure-sensitive tape since 1931 (counts 1, 2, 3), in magnetic

recording media since 1946 (counts 4, 5, 6) and in aluminum presensitized lithographic plates since 1950 (counts 7, 8, 9). The grand jury investigation resulted from a complaint which the Department of Justice received from East St. Louis, Illinois, in 1958 about alleged antitrust violations in the magnetic recording tape industry (R. 86). The indictment alleged that the offenses charged were accomplished, among other means, by coercing competitors, through patent-infringement suits or threats thereof, into accepting restrictive patent-license agreements (*e.g.*, pars. 9(a), R. 5; 26(a), R. 12; 44(a), R. 18). All counts of the indictment alleged that the offense had been carried out in part in the Eastern District of Illinois, which includes both Danville and East St. Louis (*e.g.*, par. 28, R. 14).

The alleged violations were nation-wide and the government conceded, before any motion to transfer was made, that the case could have been filed in a number of other districts, including the Northern District of Illinois—where the office of the Antitrust Division in immediate charge of the investigation is located—and the District of Minnesota—where the defendant, a Delaware corporation, has its principal office (R. 30).

THE MOTION TO TRANSFER

On March 12, 1962, 3M filed a motion under Rule 21(b) of the Federal Rules of Criminal Procedure to transfer the case to the District of Minnesota, on the ground that such transfer "would be in the interest of justice" (R. 39). The principal facts relied

upon, as set forth in affidavits attached to the motion, were the following:

(a) The defendant's general and administrative offices, its research laboratories, and a large number of its manufacturing plants were located in or near St. Paul, and none of its 20 branch sales offices was located in the Eastern District of Illinois (R. 42).

(b) Numerous documents subpoenaed by the grand jury were examined by representatives of the Antitrust Division at St. Paul, and selected documents were then delivered to the Division's Chicago Office, together with about 15,000 other documents obtained in prior investigations (R. 42–43). Defendant's copies of these documents were located in the office of its general counsel at St. Paul or in the office of its trial counsel at Chicago (R. 44). All of these documents will eventually have to be taken to the place of trial; to require 3M to prepare and transport them to Danville would cause it additional expense (R. 44).

(c) An adequate defense would require the immediate availability at the trial of eight officers residing at St. Paul (R. 45).

(d) Trial at St. Paul would eliminate the need for local counsel other than the attorneys in the office of Minnesota Mining's general counsel (R. 46).

(e) Substantial additional expense would be incurred in on-the-scene preparation and trial of the case in Danville as against St. Paul (R. 43–44, 46–47).

(f) No competitor (with one possible exception) or alleged co-conspirator maintained a principal place of business in the Eastern District of Illinois; no meetings between the defendant and the alleged co-conspira-

tors were held there; and no witness who appeared before the grand jury resided there (R. 47–48, 76–77).

(g) The trial of the case in Minneapolis or St. Paul would have encountered no delay, as the district court dockets in those cities were current and the case load per judge was much smaller in the District of Minnesota than in the Eastern District of Illinois (R. 48–49, 80).

(h) St. Paul has better air and rail service than Danville (R. 78–79).

(i) The Chairman of 3M's Board of Directors, who for many years had been the company's chief executive officer, would have to spend substantial time at the place of trial. He was 75 years old and in poor health, and the physical hardship resulting from his participation in the trial would be lessened if the case were tried in Minneapolis where he would have ready access to his personal physician (R. 52).

The government filed counter-affidavits in which it relied upon the following facts:

(a) The defendant initiated and tried a substantial number of patent infringement suits in districts other than the District of Minnesota, although in a number of such cases venue lay in that district (R. 87–88). Such cases were brought in North Carolina, Kansas, California and New York, among other states (R. 90–95). In the trial of those cases 3M transported to "distant forums" "numerous" documents, executives, scientists, attorneys and equipment (R. 88). In one of those cases 3M participated in a four-week trial at East St. Louis (R. 88).

(b) In view of the defendant's 1961 gross sales of $608,000,000 and earnings in excess of $70,000,000, there was no danger that the added expense of trial in Danville would impair the quality of the defense (R. 88).

(c) A "substantial number" of the government's prospective witnesses live within a 300-mile radius of Danville, while only one or two minor witnesses live within 300 miles of St. Paul-Minneapolis (R. 89).

(d) The average case load per judge in the District of Minnesota as of February 28, 1962, was 170 (R. 101); in that district cases such as the present are ordinarily placed at the end of the docket (R. 99). The chief deputy clerk of that district believed that if the case were transferred there, it probably would not be brought to trial within a year (R. 99). While there were 327 civil cases pending in the Eastern District of Illinois as of June 30, 1961, that figure was not an accurate guide to the case load of Judge Platt, who sits in Danville, since most of those cases were pending in East St. Louis and would be tried before another judge (R. 102). As of February 28, 1962, Judge Platt had pending before him 92 civil and 2 criminal cases, as against the average case load in the District of Minnesota of 170 per judge (R. 102–103).

(e) A "speedy" trial was essential because the return of the indictment had not put an end to the alleged illegal conduct (R. 89).

Extensive oral arguments were had on June 14, and August 21, 1963, at which the factors pertinent to disposition of the motion were fully explored.

During the oral argument on June 14, 1962, counsel for the defendant suggested that disposition of the transfer motion involved the question of "where a fair trial can be held" (R. 127) and asserted that "a fair trial to the defendant can be held in St. Paul" (*ibid.*). Judge Platt then asked defense counsel how many 3M stockholders and employees reside in the St. Paul-Minneapolis area, because of the significance of such facts upon "obtaining * * * an impartial jury" in that area (R. 128). Judge Platt agreed with defense counsel that any stockholder could be challenged for cause by the government, but requested defense counsel to supply the number of stockholders and employees in the area (R. 128). The defendant submitted statistics showing that 17,153 stockholders and non-stockholder employees lived in Ramsey County, where St. Paul is located; and 5,425 in Hennepin County, where Minneapolis is located (R. 190). At the oral argument on August 21, 1962, defense counsel also pointed out that any possible prejudice which might occur from selecting jurors from the St. Paul-Minneapolis area could be obviated by drawing jurors from the rest of the District of Minnesota (R. 201).

THE DECISION OF THE DISTRICT COURT

On August 31, 1962, Judge Platt denied the motion to transfer. In an accompanying memorandum he separately discussed each of the ten factors which 3M had urged were pertinent criteria for determining whether the transfer would be in the "interest of

justice" (R. 220).[1] The court noted, *inter alia*, that the docket in Danville, without a doubt, would provide an earlier trial than the docket in the Minnesota District (R. 226); that those witnesses who are officers or employees of the defendant would find it more convenient if the case were transferred to St. Paul, but that Danville (according to the government's affidavit) was substantially closer and more convenient for the majority of the key government witnesses (R. 221–222); that it was difficult to determine, without the disclosure of evidence, where the greater number of the patent negotiations involved in the litigation had taken place (R. 222–223); that while it would be inconvenient for the defendant to transport to Danville those documents, necessary to trial, which are located in St. Paul, there was no claim that such documents were indispensable to the day-to-day operation of defendant's business (R. 223); that a trial in Minnesota would require the government to transfer nine heavy corrugated boxes containing more than 15,000 documents (R. 223); that in view of the size of defendant's operations and the number of its plants and their locations, the disruption to defendant's business which would result from trial in Danville, although greater than would be entailed by trial in St. Paul, should

[1] The factors were: (1) Location of corporate defendant; (2) location of possible witnesses; (3) location of events likely to be in issue; (4) location of documents and records likely to be involved; (5) disruption of defendant's business unless the case is transferred; (6) expense to the parties; (7) location of counsel; (8) relative accessibility of place of trial; (9) docket condition of each district or division involved; (10) any other special elements which might affect the transfer (R. 220).

not be too great (R. 223–224); that a trial in Danville would be more expensive to defendant than a trial in St. Paul but would be less expensive to the government (R. 224); and that while defendant's legal department and retained patent lawyers are located in St. Paul, Danville would be easily accessible to the government attorneys and Minnesota Mining's outside attorneys, all of whom are in Chicago (R. 224).

The memorandum concluded with a section entitled "Special Elements of Hardship." Under that heading, Judge Platt first found that the Chairman of the Board of 3M would not be more severely taxed by a trial in Danville than in St. Paul (R. 226). Finally, as "one other item which cannot be overlooked," the court stated that in view of defendant's extensive activities in the St. Paul-Minneapolis area and the large number of contacts that its employees and stockholders had made there, "[i]t would be more difficult to get a fair and impartial jury in the Minnesota District than in the Eastern District of Illinois" (R. 226–227).

THE DECISION OF THE COURT OF APPEALS

The respondent then petitioned the Court of Appeals for the Seventh Circuit to issue a writ of mandamus directing the transfer. The petition stated (R. 229) that Judge Platt had denied 3M "its right to a trial of the criminal case in its home district mainly on the ground that the government could not obtain a fair trial in the Federal Courts of the District of Minnesota," and that the denial of transfer "constitute[d] a severe abuse of discretion." The court of appeals

issued a rule to show cause why the writ should not issue (R. 233).

In a personally signed answer to the rule to show cause, Judge Platt denied that his "conclusion that it would be more difficult for the Government to obtain an impartial jury in the District of Minnesota" was "the sole or main ground for denying transfer * * *. Said factor was but one of a number of factors, all of which are fully set forth in respondent's brief, which led respondent to his conclusion. In the memorandum and order, respondent mentioned the numerous factors considered (adopting those advocated by petitioner) and pointed out that he had considered additional facts not there mentioned in the interests of brevity" (R. 234–235).

Judge Platt further stated (R. 236):

> This respondent gave consideration to all factors urged by petitioner and found several which militated against transfer. It appeared to respondent that the trial of the case would be delayed at least a year by the transfer, and the Government avowed a speedy trial was essential because some of petitioner's competitors are in financial straits owing to petitioner's alleged conduct and to the fact that petitioner has refused to halt its allegedly illegal activities; that the Government's witnesses may be inconvenienced if forced to travel to the northern city of St. Paul, Minnesota; that the Government's documents are already in Danville in the custody of the Clerk of the Court and would have to be transported to St. Paul; that transfer would increase the Government's expense because its witness' fees would be greater, as

> would cost of transportation of the Government's staff; that it would be more difficult for the Government to get an impartial jury in St. Paul than in Danville. It further appeared to respondent that petitioner has operated on a nation-wide scale in its business of licensing and selling in the industries here involved; that there is support for the Government's avowal that petitioner's overt acts have substantially affected the residents of the Eastern District of Illinois; that this is not an "imported" case; and that, considering all the evidence and facts in the over-all, trial in the Eastern District of Illinois would be in the "interest of justice."

As a footnote to the statement that "it would be more difficult for the Government to get an impartial jury in St. Paul than in Danville," Judge Platt noted that "both sides are entitled to a fair jury and obstacles thereto adversely affect the 'interest of justice'."

On February 27, 1963, the court of appeals, Chief Judge Hastings dissenting, granted the petition and ordered Judge Platt to transfer the case to Minnesota forthwith (R. 238–254). The court held (R. 243–247) that it was improper for Judge Platt to have taken into consideration the difficulty of obtaining an impartial jury in the District of Minnesota, and it stated (R. 240, n. 1) that it deemed this factor the most important element in his decision. The court also stated that it could not ignore "[t]he underlying spirit of the constitutional concern for trial in the vicinage of the defendant, rooted in centuries of Anglo-Saxon jurisprudence and universally recognized by the federal courts" (R. 243; see, also, R. 241, 242). The court concluded (R. 248) that

> * * * in addition to the demonstration by proof or admission of the essential elements of convenience, expense, and early trial, constituting "interest of justice" in a civil case * * * this criminal case is impressed with the fundamental historical right of a defendant to be prosecuted in its own environment or district * * *. Consequently, we are convinced that this multiple-venue criminal prosecution should be tried in the district of Minnesota, which is the home of petitioner.

In a footnote the court declared that "[a] trial in the Eastern District of Illinois will result in unjustifiable increased expenses to petitioner of at least $100,000, great inconvenience of witnesses, serious disruption of business and interference of contact between the petitioner's executives and its trial attorneys in connection with protracted antitrust prosecution trial"; and that although there was "no serious congestion" in the docket of the District Court of Minnesota, a division of the cases pending in the Eastern District of Illinois between the two judges of that district "would reveal a considerable case load for both of them" (R. 248).

Chief Judge Hastings, in dissent, concluded that "a consideration of all the factors relied upon by respondent fails to demonstrate any abuse of discretion and certainly none sufficient to justify the issuance of this extraordinary writ" (R. 251). He stated that acceptance of the majority's view would compel transfer of every multiple-venue Sherman Act prosecution to the district of the defendant's main office (R. 253). He also stated that the court of ap-

peals had no power to order transfer itself and should instead have directed Judge Platt to reconsider the motion (R. 253–254).

SUMMARY OF ARGUMENT

The court of appeals, upon reviewing by mandamus the district court's refusal to transfer this criminal antitrust case, concluded that one of the factors upon which the district court had relied—the difficulties of obtaining an impartial jury in the transferee district—was improper. But instead of remanding to the district court to reconsider without that factor, the court of appeals itself made a *de novo* examination of the record and concluded that "the interest of justice" required transfer. While in our petition for certiorari we did not challenge the court of appeals' use of mandamus to review the transfer order, upon further study of the problem we have concluded that such use was highly dubious. Where, as here, any use of the writ is questionable, the way it is actually used must be scrutinized with particular care to insure that it is not employed beyond its traditional function.

The limited function of an extraordinary writ is "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so" (*Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 26). In considering, as one of many factors bearing on the appropriateness of transfer the difficulty of obtaining an impartial jury in the transferee court, the district court neither acted beyond its jurisdiction nor abused

its power. Any error it committed was of the kind ordinarily not reviewable by extraordinary writ.

A. Rule 21(b) of the Federal Rules of Criminal Procedure provides for transfer of a criminal case where an offense was committed in one or more districts "if the court is satisfied that in the interest of justice" the proceeding should be transferred. This provision leaves the determination whether a particular case should be transferred to the discretion of the district judge. The factors to be considered and the weight to be given to them will ordinarily vary from case to case, and no fixed standards can be specified. In the present case the district court carefully considered a large number of factors bearing on the appropriateness of transfer. The court of appeals concluded that the district court had improperly taken into account alleged difficulties in obtaining a fair trial in the transferee district—a ruling we did not challenge. But the court of appeals committed clear error when it thereupon itself undertook a *de novo* examination of the record and exercised the discretionary function—which Rule 21(b) commits to the district court—of evaluating the various factors to determine whether a transfer would be in the interest of justice.

Mandamus cannot be used "to actually control the decision of the trial court * * *" (*Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 383), or "to compel the court below to decide a matter before it in a particular way" (*In re Rice*, 155 U.S. 396, 403). The court of appeals, upon laying bare the error of

the district court, should have remanded to that court for reconsideration under the proper criteria; it had no warrant for itself undertaking to decide the ultimate "interest-of-justice" issue which Rule 21(b) commits to the discretion of the district court.

B. The court of appeals plainly erred in ruling that this case "is impressed with the fundamental historical right of a defendant to be prosecuted in its own environment or district" (R. 248). A criminal defendant has no constitutional right to be prosecuted in the district where he resides. His right is to be prosecuted in the district where the crime was committed. Both Article III, Section 2 of the Constitution and the Sixth Amendment specifically so provide. "The Constitution makes it clear that determination of proper venue in a criminal case requires determination of where the crime was committed. * * * The provision for trial in the vicinity of the crime is a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place." (*United States* v. *Cores*, 356 U.S. 405, 407).

In the present case, the indictment charged that some of the acts constituting the alleged violations took place in the Eastern District of Illinois. That district was, therefore, the "vicinage of the crime" (*Johnston* v. *United States*, 351 U.S. 215–220), and venue was properly laid there. The location of the main office of a corporate defendant is significant only to the extent that any benefits to the defendant which result from trial near its home office bear upon whether a transfer would be "in the interest of justice."

ARGUMENT

THE COURT OF APPEALS MISUSED THE WRIT OF MANDAMUS WHEN, UPON RULING THAT THE DISTRICT COURT HAD CONSIDERED AN IMPROPER FACTOR IN DENYING TRANSFER, IT DIRECTED TRANSFER INSTEAD OF REMANDING TO THE DISTRICT COURT FOR THE EXERCISE OF ITS DISCRETION

Introduction

The district court, having "carefully reviewed the facts and circumstances relating to the transfer of this case," held that "in the interest of justice" the case should not be transferred (R. 227). The court of appeals undertook to review the refusal to transfer by writ of mandamus and, upon concluding that the district court had improperly taken into account one of the numerous factors upon which its decision was based, itself directed the transfer. In our petition for certiorari, we did not challenge the court of appeals' use of mandamus to review the denial of transfer, but urged that, upon concluding that the district court erroneously relied upon a particular factor, the appellate court should have remanded to the district court for reconsideration.

Upon further study of the problem—and particularly in the light of our analysis of the related question of the use of mandamus to review a transfer order in a civil case involved in *Van Dusen* v. *Barrack*, No. 80, this Term (see *infra*, pp. 19–22)—we have concluded that there is serious doubt whether an extraordinary writ may be used at all to review directly a district court's denial of transfer in the circumstances of this case. Since the use of mandamus presents a delicate problem of judicial administration involving the direct

interference by appellate courts in trial court proceedings, we believe that it is appropriate to bring the matter to the Court's attention. Furthermore, we think that the doubt as to the propriety of using the writ may properly be taken into account in determining whether the court of appeals, upon ruling that the district court's denial of transfer rested in part upon an improper factor, was warranted in itself directing transfer rather than remanding to the district court to reconsider without regard to that factor. For when it is questionable whether the writ should be used at all, the way in which it is used must be scrutinized with particular care to insure that its "office * * * [is not] enlarged to actually control the decision of the trial court rather than used in its traditional function of confining a court to its prescribed jurisdiction." *Bankers Life and Casualty Co.* v. *Holland*, 346 U.S. 379, 383.

Extraordinary writs are "reserved for really extraordinary causes" (*Ex parte Fahey*, 332 U.S. 258, 260), and their limited function is "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so" (*Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 26). Mandamus may not be used to review an interlocutory order where "the district court has acted within its jurisdiction and has rendered a decision which, even if erroneous, involved no abuse of judicial power" (*Roche, supra*, at 32). As we show below, the greater difficulty in selecting a jury in St. Paul than in Danville was a factor which the district court properly could con-

sider. There is great doubt whether mandamus may be used to review a transfer order on the ground that, in considering this factor, the district court took into account not only the difficulties in obtaining jurors who had no relationship with 3M, but also the possibility that the company's influence in St. Paul might be so pervasive as to make it difficult for the government to obtain a fair trial there. For in considering the latter possibility—and we have not sought review of the court of appeals' ruling that such consideration was improper—the district court neither acted beyond its jurisdiction nor abused its power. It committed only an error of the kind which ordinarily is not reviewable by extraordinary writ.[2]

In *Van Dusen* v. *Barrack*, No. 80, this Term, the government has taken the position that it is doubtful whether a court of appeals properly may utilize mandamus to review a transfer order in a civil case under 28 U.S.C. 1404(a), where the complaining party had failed to seek review under the Interlocutory Appeals Act. See our brief in that case, pp. 27–37.[3] There are several distinctions between this case and *Van Dusen* which on balance suggest that there is even less ground for review by mandamus in this criminal case.

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[2] The Fourth Circuit has broadly held that it will not review refusal to transfer under 21(b) by mandamus, but will consider such denial on appeal from any conviction. *United States* v. *Foster*, 296 F. 2d 249. Mandamus has been employed, however, to review transfer orders under Rule 21(b) where the case was transferred to a district in which venue allegedly did not lie. *United States* v. *Cashin*, 281 F. 2d 669 (C.A. 2); *United States* v. *Choate*, 276 F. 2d 724 (C.A. 5).

First. In *Van Dusen* the Interlocutory Appeals Act was available. There is no comparable provision for interlocutory appeals in criminal cases and, indeed, such appeals are strongly disfavored. See *Di Bella* v. *United States*, 369 U.S. 121, 129–130. While the lack of any direct review of interlocutory orders in criminal cases might be viewed as justifying review of such orders by mandamus, this fact also tends to emphasize the strength of the policy against *any* immediate review of such orders. See *Di Bella, supra*, at 130–131. Indeed, it was this policy which underlay the holding in *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, that a court of appeals had improperly used mandamus to correct a district court's alleged error in striking pleas in abatement to an indictment. The Court stated (*id.* at 32): "In issuing the writ the court of appeals below has done no more than substitute mandamus for an appeal contrary to the statutes and the policy of Congress, which has restricted the court's appellate review to final judgments of the district court."

Second. Van Dusen involves the construction of the transfer statute, and such a question of statutory interpretation may sometimes be of sufficient general importance to warrant immediate review. The present case, however, involves only the standards by which the district court is to exercise its discretion in passing upon transfer motions. In such cases the court of appeals ordinarily will not be called upon to enunciate any broad standards of general applicability—if they ever can be formulated in this area—but only to evaluate the validity of a standard con-

sidered in the light of the facts of the particular case. There would thus seem to be even less basis for review by mandamus in the present case than in *Van Dusen*.

Third. In one narrow respect there may be greater justification for the use of mandamus here than in *Van Dusen*. The alleged error of the district court in *Van Dusen* was a misinterpretation of the statute—*i.e.*, an improper construction of the phrase "where it [the transferred action] might have been brought"—and such error could be effectively corrected upon appeal from the final judgment of the transferee court. In the present case, however, it is doubtful how effective review of the transfer order would be after trial. As we show below, the court of appeals, upon laying bare the district court's error of having considered an improper factor, was required to remand the case to the district court to reexercise its discretion on the basis of the proper factors. If, after conviction, the court of appeals were to direct the district court to reconsider its earlier denial of transfer, the latter's inevitable reluctance to let a lengthy trial go to naught would be likely to influence its judgment as to whether, without considering the improper factor, it would have directed transfer.

Moreover, it may be extremely difficult for the defendant to demonstrate after trial that any erroneous exercise of discretion by the district court was prejudicial.[8] This condition suggests that to be mean-

[8] See *Scott* v. *United States*, 255 F. 2d 18 (C.A. 4) and *Blumenfield* v. *United States*, 284 F. 2d 46 (C.A. 8), in which the courts, in reviewing after conviction refusals to transfer under Rule 21(b), held that the trial court had not abused its discretion in retaining the case.

ingful review must be had before trial; but it also strongly indicates that such errors in denying transfer are not of sufficient importance to warrant use of an extraordinary writ to review them.

It is against the background of this unsettled and troublesome question whether the writ of mandamus is ever available to review a district court's alleged "abuse of discretion" in ruling on a Rule 21(b) motion that the Seventh Circuit not only undertook review by extraordinary writ, but after determining that one of the factors relied on by the district court was improper, ordered transfer of the case itself rather than remanding for the district court's reconsideration under proper criteria. We submit that the dubiety of any use of the writ to review a denial of transfer is relevant in judging whether the court of appeals erred on the merits, but even if we are wrong about the availability of the writ—or if we are barred from raising that question—the order directing the transfer should be reversed.

A. *The court of appeals, upon ruling that the district court had improperly considered a particular factor in denying transfer, should have remanded to the district court to reconsider under the proper standards*

Rule 21(b) of the Federal Rules of Criminal Procedure provides that the district court, upon motion of the defendant, shall transfer a criminal case to another district or division if the offense was committed in one or more districts or divisions and—

> if the court is satisfied that in the interest of justice the proceeding should be transfered to

another district or division in which the commission of the offense is charged.

This provision places the determination whether to transfer a case in the discretion of the district judge. The only standard provided is "the interest of justice," and transfer is to be made only if the court "is satisfied" that it would serve that interest. Whether "the interest of justice" would best be served by transfer of a particular case necessarily depends upon all the circumstances of that case, and no fixed standards can be formulated for making that determination. The factors to be considered and the weight to be given to them will ordinarily vary from case to case, and their evaluation in light of the general standard of "interest of justice" necessarily is committed to the informed discretion of the district judge. See *Holdsworth* v. *United States*, 179 F. 2d 933, 937 (C.A. 1); Notes of Advisory Committee on Rules, 18 U.S.C. following Rule 21.

The district court in the present case exercised its discretion against tranfer on the basis of extensive affidavits, briefs, and two days of oral argument. Judge Platt's memorandum discussed in detail the ten principal factors which 3M urged were pertinent in determining whether the case should be transferred—as well as other facts mentioned by counsel which he did not discuss in order to avoid lengthening his memorandum (R. 227)—and the court, having "carefully reviewed the facts and circumstances relating to the transfer * * * concluded that 'in the interest of justice' the cause should be tried in the Eastern District of Illinois" (R. 227). As Judge

Platt explained in his response to the rule to show cause, he found that there were "several [factors] which militated against transfer" (R. 236):

> * * * It appeared to respondent that the trial of the case would be delayed at least a year by the transfer, and the Government avowed a speedy trial was essential because some of petitioner's competitors are in financial straits owing to petitioner's alleged conduct and to the fact that petitioner has refused to halt its allegedly illegal activities; that the Government's witnesses may be inconvenienced if forced to travel to the northern city of St. Paul, Minnesota; that the Government's documents are already in Danville in the custody of the Clerk of the Court and would have to be transported to St. Paul; that transfer would increase the Government's expenses because its witness' fees would be greater, as would cost of transportation of the Government's staff; that it would be more difficult for the Government to get an impartial jury in St. Paul than in Danville.

Apart from Judge Platt's reliance upon the greater difficulty of obtaining "a fair and impartial jury" in the District of Minnesota than in the Eastern District of Illinois (R. 227; but see *infra*, pp. 28–29), the other factors which he enumerated plainly were pertinent criteria for determining whether to transfer. Indeed, if Judge Platt had relied solely on them in deciding against transfer, such a ruling could not have been successfully challenged as an abuse of discretion.

The court of appeals stated (R. 240, n. 1) that Judge Platt had treated "the alleged difficulty of getting a fair and impartial jury in the Minnesota district" as "the most important item" "relevant to a transfer," and it held that consideration of this factor was improper. But instead of remanding to the district court to reexercise its discretion without considering that factor, the court of appeals proceeded to make its own evaluation of the factors bearing on transfer;[4] ruled that the record demonstrated "the essential elements of convenience, expense and early trial, constituting 'interest of justice' in a civil case," and that in addition "this criminal case is impressed with the fundamental historical right of a defendant to be prosecuted in its own environment or district * * *" (R. 248); and concluded (*ibid.*): "[W]e are convinced that this multiple-venue criminal prosecution should be tried in the district of Minnesota, which is the home of petitioner."

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[4] In making this evaluation, the court of appeals stated in a footnote to its opinion (R. 248):

"There is no serious congestion in the docket of the District Court of Minnesota, while a division of the cases pending in the Eastern District of Illinois between the two judges of that district would reveal a considerable case load for both of them."

This statement is obviously based on 3M's evidence that the average case load per judge in the District of Minnesota was 141.5, while the average case load per judge in the Eastern District of Illinois was 163.5 (R. 80). As shown in the Statement (*supra*, p. 7), however, this comparison is not an accurate guide to the condition of Judge Platt's docket, since most of the cases in the Eastern District of Illinois are pending in East St. Louis and will be tried before another judge who sits there. The record shows that Judge Platt's case load at Danville was only 92 civil cases and 2 criminal cases (R. 102).

In short, the appellate court undertook a *de novo* examination of the record and itself exercised the discretionary function—which Rule 21(b) commits to the district court—of evaluating the various factors which determine whether a transfer would be in the interest of justice.

This was clear error. For whatever may be the propriety of using mandamus to review a transfer order in these circumstances (see the introduction, *supra*, pp. 18-22), if the writ is so used it cannot be used "to actually control the decision of the trial court * * *". (*Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 383) or "to compel the court below to decide a matter before it in a particular way" (*In re Rice*, 155 U.S. 396, 403). The function of an appellate court which undertakes to review by mandamus the basis of a district court's discretionary denial of transfer is analogous to that of an appellate court reviewing an order of an administrative agency, which "exhaust[s]" its authority when it has "laid bare that error, * * * and, compell[ed] obedience to its correction * * *" (*Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145). Here the error laid bare was the consideration of an improper factor; the method for correcting it was a remand to the district court to reexercise its discretion without considering that factor. The court of appeals had no warrant for going beyond that point and itself undertaking to decide the ultimate "interest of justice" issue which Rule 21(b) commits to the discretion of the district court.

This Court has strongly condemned a similar attempt by the court below to make a *de novo* determination of an issue in a criminal case which is committed to the discretion of the district court. In *United States* v. *Johnson*, 327 U.S. 106, the defendant filed a second motion for a new trial on the ground of newly discovered evidence which allegedly showed that Goldstein, one of the government witnesses against him, had committed perjury. The trial court carefully analyzed the supporting affidavits and concluded that, although they contained statements which would have been relevant and admissible at the original trial to discredit Goldstein's testimony, they "failed to prove that Goldstein had committed perjury, and that consequently the basic ground for the motion—that there was new evidence showing that Goldstein had perjured himself—was without foundation. That court found again [as it had in denying an earlier motion for a new trial based on the same claim] that the new and old evidence taken together affirmatively showed that Goldstein had been a truthful witness" (327 U.S. at 110). The court of appeals reversed. "The majority of the court reviewed parts of the affidavits and concluded from them that the trial judge's finding that Goldstein did not commit perjury was illogical and unreasonable. The majority substituted its own finding that Goldstein's original testimony was 'unerringly false' and held that the trial judge's contrary conclusion amounted to an abuse of discretion" (*id.* at 110–111).

This Court in turn reversed, holding that the court of appeals should have dismissed the appeal as friv-

olous (*id.* at 113). The Court held (*id.* at 112) that the record "shows clearly that the trial judge gave the numerous elements of the controversy careful and honest consideration"; that the trial court's findings were plainly supported by evidence (*ibid.*); that "it is not the province of * * * the circuit court of appeals to review orders granting or denying motions for a new trial when such review is sought on the alleged ground that the trial court made erroneous findings of fact" (*id.* at 111); and that the court of appeals "was wrong * * * when it did review the facts de novo and order the judgment set aside" (*id.* at 113). The same reasoning applies to the present case, and the court of appeals was equally "wrong" when, upon ruling that the district court had erroneously considered a particular factor, it undertook to "review the facts de novo" and made its own determination that transfer would be in the "interest of justice."

A remand in this case was particularly appropriate in view of the ambiguous character of the district court's alleged reliance on the difficulty in obtaining a fair trial in Minnesota. In his memorandum Judge Platt, after pointing to the "many" employees and stockholders which 3M has in the St. Paul area and the many positions which the company's officers and employees hold in financial, civic and educational institutions there, stated that "when one considers the number of contacts that its employees and stockholders have made over the area, and the pride that the community in that area would have, and should have, in 3M, there might exist a very severe influence on any

citizen in the area called for jury service" (R. 226–227). He then concluded (*ibid.*): "It would be more difficult to get a fair and impartial jury in the Minnesota District than in the Eastern District of Illinois."

The latter statement may have related only to the difficulties of obtaining an impartial jury in St. Paul rather than to the likelihood that no fair and impartial jury could be obtained there. That is, Judge Platt may have been merely recognizing that, because of 3M's position in St. Paul, it might take longer and be more arduous to select a proper jury in St. Paul than in Danville. If that is what Judge Platt meant by his reference to the difficulty of obtaining an impartial jury in St. Paul, it would be just as valid a consideration against transfer as the other factors indicating that transfer would delay the ultimate disposition of this important antitrust case.

As we read the court of appeals' opinion, the court did not question the propriety of considering the possible delay and difficulties in picking a proper jury if the case were tried in St. Paul; it held only that the district court had improperly considered whether a fair trial could be had at all in that city. Since the court of appeals may have misinterpreted the district court's ruling on this issue, and since there is also disagreement between the two courts over how important this factor was in the district court's decision (see the Statement, *supra*, pp. 11–13),[5] due respect for

[5] In his response to the rule to show cause, Judge Platt stated (R. 234–235) that the difficulty of obtaining an impartial jury in St. Paul was not "the sole or main ground for denying transfer" and was "but one of a number of factors" which led to that conclusion. The court of appeals stated (R. 240, n. 1),

the district court's broad discretion in transfer cases required the court of appeals, upon concluding that the district court had erred in considering whether a fair trial could be had in St. Paul, to remand to that court for reconsideration.

The proper disposition is illustrated by the Seventh Circuit's own decision in *Chicago, R. I. & P. R. Co.* v. *Igoe*, 212 F. 2d 378. There the district court (Judge Igoe) had refused to transfer a civil case under 28 U.S.C. 1404(a) on the ground that the transfer statute does not apply to cases that had been instituted in a state court and removed to the federal court. The court of appeals held that the district court had erred in denying transfer on that ground, but refused itself to decide whether to transfer and remand to the district court to make that determination. It stated (212 F. 2d at 382): "Ultimate decision on that motion is within the province of the District Court, and we cannot, as petitioner would have us do, usurp its function and decide the question in this court."* See, also, *Evaporated Milk Association* v. *Roche*, 130 F. 2d 843 (C.A. 9), reversed, 319 U.S. 21; *United States* v. *Choate*, 276 F. 2d 724, 729 (C.A. 5).

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however, that "we are convinced" that this factor was "the most important item" in Judge Platt's decision.

*Upon the remand the district court, after considering the relevant factors, concluded that transfer would not be for the convenience of the parties and the witnesses or in the interest of justice. The railroad again sought a writ of mandamus and the court, sitting *en banc*, reversed Judge Igoe's determination and directed him to transfer the case, over the strong dissent of Judge Finnegan. *Chicago, R. I. & P. R. Co.* v. *Igoe*, 220 F. 2d 299, certiorari denied, 350 U.S. 922.

B. *In determining whether transfer of a criminal case is "in the interest of justice" under Rule 21(b), the fact that the main office of the corporate defendant is in the transferee district is itself irrelevant*

In deciding that "this multiple-venue criminal prosecution should be tried in the district of Minnesota, which is the home of petitioner" (R. 248), the court of appeals gave heavy, if not dispositive, weight to its view that criminal defendants have a right to be tried in their home districts. Thus, the court referred to the Constitutional safeguard "against opening the door to needless hardship to an accused by prosecution remote from home and from appropriate facilities for defense" (R. 241), and to "[t]he underlying spirit of the constitutional concern for trial in the vicinage of the defendant, rooted in centuries of Anglo-Saxon jurisprudence and universally recognized by the federal courts" (R. 243). Immediately prior to its ultimate conclusion that this case "should be tried" in St. Paul, "the home of petitioner," the court stated (R. 248) that in addition to the elements which in its view demonstrated that transfer would be in the "interest of justice," "this criminal case is impressed with the fundamental historical right of a defendant to be prosecuted in its own environment or district * * *."

The court was clearly in error. A criminal defendant has no constitutional or historical right to be prosecuted in the district where he resides; his right is to be prosecuted in the district where the crime was committed. It is that right, and that right alone, which the Constitution protects.

The Constitution is explicit on the point. Article III, Section 2 provides that "The Trial of all Crimes * * * shall be held in the State where the said Crimes shall have been committed * * *"; and the Sixth Amendment guarantees the accused "the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed * * *." "The Constitution makes it clear that determination of proper venue in a criminal case requires determination of where the crime was committed. * * * The provision for trial in the vicinity of the crime is a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place" (*United States* v. *Cores*, 356 U.S. 405, 407). "This requirement of venue states the public policy that fixes the situs of the trial in the vicinage of the crime rather than the residence of the accused" (*Johnston* v. *United States*, 351 U.S. 215, 220–221).

The court of appeals was under the misapprehension that "vicinage" refers to the residence of the defendant. At common law, the term "vicinage" meant the neighborhood from which the jury was to be drawn, which was "the county where the fact is committed." 4 Blackstone, *Commentaries* 350 (Lewis ed., 1900).[7] Vicinage was therefore the place of the

[7] 4 Blackstone, *Commentaries* 350 (Lewis ed., 1900):

"When, therefore, a prisoner on his arraignment hath pleaded *not guilty*, and for his trial hath put himself upon the country, which country the jury are, the sheriff of the county must return a panel of jurors, *liberos et legales homines, de vicineto* [free and lawful men of the vicinage]; that is, freeholders, without just exception, and of the *vicne* or neighborhood; which is interpreted to be of the county where the fact is committed."

crime, not the home of the defendant. It is this right which the Constitution protects and, consistent with this view, it has long been settled that venue is proper in the district where the crime has been committed, even though the defendant resides elsewhere. *In re Palliser*, 136 U.S. 257, 265; *Johnston* v. *United States*, *supra*.

In the present case, the indictment charged that some of the acts constituting the alleged violations of the Sherman Act took place in the Eastern District of Illinois. That district was, therefore, the "vicinage of the crime" (*Johnston, supra*), and venue was properly laid there. Indeed, Rule 21(b) presupposes that venue is correct, since it permits transfer only if "it appears * * * that the offense was committed in more than one district or division" and only "to another district or division in which the commission of the offense is charged." If the venue had been improperly laid in Danville, the appropriate procedure would have been a motion to dismiss, not a motion to transfer.

The fact that the transferee district is the home of the defendant—or, in the case of a corporation, its main office—thus has no independent significance on whether transfer to that district would be "in the interest of justice." Of course, trial at the place of a corporation's main office may have advantages for it, such as ease of transporting records and convenience of attendance of company personnel and counsel. But the significant thing is the consequences which flow from trial near the home office, and not the isolated fact of trial at that place. Indeed, there may

be cases in which trial at the home office would not be advantageous to the company, such as where the pertinent records and personnel were located at a distant branch office.

In the present case, 3M presented to the district court various reasons why trial in the District of Minnesota would be more convenient to it. The government presented other considerations favoring trial at Danville. The district court, in denying transfer, recognized that there would be additional burdens upon 3M, but concluded that these burdens were not so substantial as to outweigh the arguments in favor of retaining the case.

The evaluation of the competing factors was within the district court's discretion (see *supra*, pp. 22–23). When the court of appeals concluded that the district court had improperly considered another factor, it was required to remand to the district court for reconsideration. On reconsideration the district court might conclude that, without the irrelevant factor, the case should be transferred, or it might decide still to retain the case. But unless it is clear that without considering the improper factor the district court would have no alternative but to transfer, the court of appeals has no basis for directing transfer. Transfer could be mandatory only if there were a policy favoring trial of Sherman Act cases at a corporate defendant's home office so strong that it must prevail unless there are overwhelming counterbalancing factors in the particular case. As we have shown, there is no such policy. The defendant's constitutional right is to be tried in the district where the

crime was committed. That right would be fully vindicated by trial of the present case in the Eastern District of Illinois, where the offenses charged in the indictment are alleged to have been committed in part.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals directing transfer should be reversed, and the case remanded to the district court for further proceedings.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
WILLIAM H. ORRICK, JR.,
Assistant Attorney General.
DANIEL M. FRIEDMAN,
Assistant to the Solicitor General.
LIONEL KESTENBAUM,
MICHAEL I. MILLER,
Attorneys.

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